

“Ordered Liberty in the Age of International Terrorism”
Harold Leventhal Talk
June 7, 2002
Remarks of Assistant Attorney General Viet D. Dinh

Good Afternoon. It is an honor to be here today, and especially at this forum. I am honored to be in this company. Judge Harold Leventhal, for whom this lecture is named, and the roster of judges – Judge Williams, Judge Randolph, and Judge Tatel – who have recently spoken in his name are a testament to the virtue of the rule of law in our society.

Fundamental to the rule of law is the concept of ordered liberty that is the topic of my talk today. The Supreme Court used the phrase “ordered liberty” in *Palko v. Connecticut*. Of course, in recent decades that phrase has come to be identified with the development of substantive due process in constitutional law. But at the risk of being accused of a bait and switch, I do not plan to discuss the penumbral reach of substantive due process, for example, to limit punitive damages for a repainted car, as was the case in *BMW v. Gore*.

Regardless whether limits on punitive damages are implicit in the concept of ordered liberty, the core meaning of that concept is profoundly relevant to our current war against terror. Some have suggested that the actions we have taken to prosecute that war are a threat to liberty; others defend those actions as vital to the preservation of our liberty. I seek today to mediate these opposing viewpoints by exploring the meaning of ordered liberty. This return to first principles may seem pedantic to this audience, well versed in law and jurisprudence. With your indulgence, I think it is important at this time of peril for us to take stock of certain basic questions: 1) what is it we are fighting for; 2) who is it we are fighting against; and 3) how are we to wage this fight?

I. For What Are We Fighting? The Concept of Ordered Liberty.

When the nation is under attack, the natural answer to the first question, what are we fighting for, is: for the security of America and the safety of her people. That answer naturally pits security against other societal values and leads some to recite Benjamin Franklin's now-famous statement, "they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

That we are fighting for security and safety is a true enough answer, but I do not think it is a complete answer. In this sense I agree with Franklin and those who quote him that one should not trade liberty (let alone essential liberty) for safety (let alone a little temporary safety). But the trade-off between security and liberty is a false choice. That is so because security should not be (and under our constitutional democracy, is not) an end in itself, but rather simply a means to the greater end of liberty.

However, my agreement with Franklin's statement does not settle the debate but only begins the conversation. For the essential question is, What do we mean by liberty? Here, I think Edmund Burke puts it best: "The only liberty I mean is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them." In other words, ordered liberty. Order and liberty, under this conception, are symbiotic; each is necessary to the stability and legitimacy that is essential for a government under law.

To illustrate this symbiotic relationship, consider liberty without order. Absent order, liberty is simply unbridled license: Men can do whatever they choose. It is easy enough to recognize that such a world, of liberty without order, is unstable, but I would argue that it is also illegitimate. A liberty of unbridled license is no liberty at all. As Rousseau recognized, "Liberty does not consist

as much in acting according to one's own will as in not being subjected to the will of anyone else." In a world of unbridled license, the strong do what they will and the weak suffer what they must. One man's expression of his desires will deprive another man of his license. Liberty without order is therefore both unstable and illegitimate – illegitimacy resulting from the infringement, by force as necessary, on one man's freedom by another's desire.

Our founders recognized this danger of unbridled license. Fisher Ames declared in 1787: "Liberty we had, but we dreaded its abuse almost as much as its loss; and the wise, who deplored the one, clearly foresaw the other." True liberty only exists in an ordered society with rules and laws that govern the behavior of men.

Just as liberty cannot exist without order, order without liberty is not only illegitimate but also unstable. The first of these propositions is widely accepted, so I will not dwell on it here. But it is important to recognize that where there is only order but not liberty, force must be exerted by men over men in an attempt to compel obedience and create a mirage of stability. Most people are familiar with Rousseau's dictum that "Man was born free, yet everywhere he is in chains." But often neglected is the sentence that immediately follows in On the Social Contract: "He who believes himself the master of others is nonetheless a greater slave than they. . . . For in recovering its freedom by means of the same right used to steal it, either the people is justified in taking it back, or those who took it away were not justified in doing so."

Order without liberty is unstable precisely because it is illegitimate. In an apparent order maintained by brute strength, the ruler has no greater claim to the use of force than his subject, and the master and slave are in a constant state of war – one trying to maintain the mirage of stability created by his use of force, the other seeking to use force to recover his lost freedom.

Order and liberty, therefore, are not competing concepts that must be balanced against each other to maintain some sort of democratic equilibrium. Rather, they are complementary values that contribute symbiotically to the stability and legitimacy of a constitutional democracy. Order and liberty go together like love and marriage and horse and carriage; you can't have one without the other.

In The Structure of Liberty, Professor Randy Barnett distinguishes liberty structured by order from unbridled license by comparing it to a tall building, the Sears Tower. License permits thousands of people to congregate in the same space, but only with the order imposed by the structure of the building – its hallways and partitions, stairwells and elevators, signs and lights – would those thousands be endowed with liberty, each to pursue his own end without trampling on others or being trampled on. “Like a building, every society has a structure that, by constraining the actions of its members, permits them at the same time to act to accomplish the ends.” To illustrate the essential necessity of that structure, Barnett posits this hypothetical: “Imagine being able to push a button and make the structure of the building instantly vanish. Thousands of persons would plunge to their deaths.”

II. Against Whom Are We Fighting? Ordered Liberty in the Face of International Terrorism.

Osama bin Laden pushed that button on September 11, and thousands of persons plunged to their deaths. Just as Barnett's Sears Tower was only a metaphor for the structure of ordered liberty, Al Qaeda's aim was not simply to destroy the World Trade Center. Its target was the very foundation of our ordered liberty.

Knowing what we now know about Al Qaeda, it is easy to see that its radical, extremist

ideology is incompatible with, and an offense to, ordered liberty. Al Qaeda seeks to subjugate women; we work for their liberation. Al Qaeda seeks to deny choice; we celebrate the marketplace of ideas. Al Qaeda seeks to suppress speech, we welcome open discussion.

More fundamental, however, is the proposition that Al Qaeda, simply by adopting the way of terror, attacks the foundation of our ordered liberty. Terrorism, whomever its perpetrator and whatever his aim, poses a fundamental threat to the ordered liberty that is the essence of our constitutional democracy.

The terrorist seeks not simply to kill, but to terrorize. His strategy is not merely to increase the count of the dead, but to bring fear to those who survive. The terrorist is indiscriminate in his choice of victims and indifferent about the value of his targets. Part of an international conspiracy of evil, he operates across boundaries and recognizes no borders. He uses violence to disrupt order, kills to foment fear, and terrorizes to incapacitate normal human activity. Thus, by definition, the methods and objectives of terror attack the foundation of ordered liberty.

In this sense, the terrorist is fundamentally different from the criminal offender normally encountered by our criminal justice system. By attacking the foundation of order in our society, the terrorist seeks to demolish the structure of liberty that governs our lives. By fomenting terror among the masses, the terrorist seeks to incapacitate the citizenry from exercising the liberty to pursue our individual ends. This is not criminality. It is a war-like attack on our polity.

In waging that war, the terrorist employs means that fundamentally differ from those used by the traditional enemies we have faced on the battlefield according to the established rules of war among nations. Those rules clearly distinguish uniformed combatants who do battle with each other from innocent civilians who are off-target—a distinction that is not only ignored but exploited by the

terrorist to his advantage. In this war, the international terrorist against whom we fight differs even from guerilla warriors of past who mingle among civilians and, at times, target innocent civilians. The evil activities of the terrorist is not limited to some hamlet in Southeast Asia or remote village in Latin America. For the international terrorist, the world is his battleground, no country is immune from attack, and all innocent civilians are exposed to the threat of wanton violence and incapacitated by the fear of terror.

This, then, is the enemy we face. A criminal whose objective is not crime but fear. A mass murderer who kills only as a means to a larger end. A predator whose victims are all innocent civilians. A warrior who exploits the rules of war. A war criminal who recognizes no boundaries and who reaches all corners of the world.

III. By What Means Do We Wage This Fight? The Prevention Paradigm.

How, then, do we confront this enemy? The valiant efforts of our men and women on the battlefield in Afghanistan and the constant vigilance of our men and women in blue on the streets of America are the traditional responses—traditional and essential in this effort. But for the Department of Justice, we needed a fundamentally different approach to the way we approached the traditional task of law enforcement. Unlike traditional soldiers, terrorists wage war dressed not in green camouflage but in the colors of street clothing. Unlike traditional criminals, terrorists are willing to sacrifice their own lives in order to take the lives of innocents. We cannot afford wait for terrorists to execute their plans; the death toll is too high; the consequences too great.

That is why since September 11, the Department has refocused its investigative and prosecutorial resources toward one overriding and overarching objective: to prevent terrorist attacks

before they happen and to disrupt terrorist activities before they threaten innocent lives. This massive effort is undertaken with one objective, to defend the foundations of our ordered liberty – to deliver freedom from fear by protecting freedom through law.

First, we have sought to create an airtight surveillance net of terrorist activity by updating the law to reflect new technologies. Law enforcement had been operating at a technological competitive disadvantage with the terrorists. We have corrected that. Congress passed the USA Patriot Act to extend the capacity of law enforcement to monitor communications in the digital, as well as the analog world. The Attorney General revised the Department’s investigative guidelines to enhance the FBI’s ability to conduct on line searches on the same terms and conditions as the general public. With each of these step, and for each of these tools, we were careful not to alter the substantive legal predicates that exist to preserve the privacy of law abiding citizens.

Second, we have enhanced the capacity of law enforcement to gather and analyze intelligence on terrorist activity. The USA Patriot Act authorized the sharing of intelligence information across government departments so that we can compile the mosaic of information required to prevent terrorism. And the recent revisions to the AG guidelines prompts the FBI to adopt a proactive role in investigating terrorist activity. The revisions devolve authority to conduct terrorist investigations to the field offices, freeing up the hands of agents to gather the pieces of the investigative puzzle. And it centralized information for analysis, so that all the pieces of the puzzle can be fitted at a single table. We have created a real-world document that will actually govern the actions of investigators – empowering their discretion where appropriate and clearly specifying the limits of their authority where necessary. These revisions, therefore, will not only enhance terrorist investigations but also reaffirm the freedom of law-abiding citizens from unnecessary intrusion.

Finally, we have employed a deliberate strategy to remove from our streets those who would seek to do us harm. We utilize our prosecutorial discretion to the fullest extent in order to incapacitate suspected terrorists from fulfilling their plans. Robert F. Kennedy's Justice Department, it was said, would arrest a mobster for spitting on the sidewalk, and Elliott Ness brought down Al Capone for tax evasion. We have sought to apply this approach to the war on terror. Any infraction, however minor, will be prosecuted against suspected terrorists. However, each and every person detained arising from our investigation into 9/11 has been detained with an individualized predicate – a criminal charge, an immigration violation, or a judicially issued material witness warrant. We do not engage in Preventive Detention. In this respect, our detention policy differs significantly from those of other countries, which can subject individuals to preventive detention simply to prevent them from committing a crime. In fact, the European Convention on Human Rights allows states to subject a person to preventive detention “when it is reasonably considered necessary to prevent his committing an offence.’

In short, in prosecuting the war of terror, we have taken every step at our discretion, used every tool at our disposal, and employed every authority under the law to prevent terrorism and defend our ordered liberty. We have done so with the constant reminder that it is liberty we are preserving and with scrupulous attention to the legal and constitutional safeguards of those liberties. The Attorney General's charge to the Department after 9/11 was simple: Think outside the box, but never outside of the Constitution.

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On the walls of the Department of Justice are inscribed the following words: “Where law ends tyranny begins.” John Locke wrote that “the end of law is not to abolish or restrain but the preserve and enlarge freedom.” Yesterday, the President of Harvard University conferred degrees on its law graduates, as he has done for the past half-century, by defining law as “the system of wise restraints that set men free.” And when Attorney General Ashcroft welcomed me to the Department, he wrote, “It is a profound honor to work with you in defense of freedom.”

The common thread that weaves these different voices and timeless phrases is law. Law as the guardian of order. Law as the protector of liberty. Law, in short, as the structure of ordered liberty that is under attack and to whose defense we are now called.

I close, therefore, with the words of Daniel Webster, spoken at a gathering of lawyers in 1847, when he raised his glass in a toast and said, “To the law. It has honored us; may we honor it.”